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IN THE

Supreme Court of the United States

October Term, 1959

No. 972

SOCONY-VACUUM OIL COMPANY, INC., now known as SOCONY-MOBIL OIL COMPANY, INC., and BETHLEHEM STEEL COMPANY,

Petitioners,

v.

CECIL LAWLOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Counter-Questions Presented

1. Whether or not the owner of a vessel afloat in navigable waters of the United States undergoing annual overhaul for a relatively short period of time, and which has a full compliment of officers and crew on board performing their usual duties in port, owes a duty to members of the crew and those doing work "traditionally done by seamen" to provide a seaworthy vessel?

2. Whether a shipyard worker inspecting tanks in a vessel to discover leaks therein which require repairs was doing work "traditionally done by seamen" where

the evidence establishes that the chief officer of the vessel had engaged in the very same work in the course of his duties as an officer of the vessel, and that chief officers were qualified and did the very same work?

Counter-Statement of Facts

This case involves an appeal from a judgment in favor of the plaintiff for personal injuries in the sum of $16,200.00 and costs. The court submitted the issue of unseaworthiness to the jury and the jury found that the vessel was unseaworthy and fixed damages at $30,000.00 and fixed contributory negligence at 46%. It also found in favor of the defendant shipowner against the third-party defendant (105a to 106a). The defendant and third-party defendant are appealing.

The vessel involved was the "S.S. MOBILFUEL." The accident occurred on June 30, 1954 (4a). On June 24, 1954 the vessel had arrived at Pier 3, Bethlehem Steel Shipbuilding Company, Staten Island, New York (38a). It left on July 2, 1954 (39a). The vessel had been in drydock a few days before it tied up at Pier 3 (39a). The vessel was afloat in the navigable waters of the United States at the time of the accident and it had a full crew of officers and men on board (39a, 66a).

The vessel had gone to the yard for "annual overhaul" (32a). The work in the tanks consisted primarily of "repairing the tank bulkheads and leaks in the tank bulkheads" (32a). At the time the regular crew was engaged in scaling the after boat deck and in performing their usual duties (39a, 66a). The crew ate and worked on board (66a). The officers and crew stood watches (67a) and routine inspections were being made of the vessel "just as they would be if the vessel were tied up at any dock or at sea" (67a).

The plaintiff was a "quarterman" employed by the third-party defendant Bethlehem Steel Company (3a). He was injured when an unsecured ladder in a tank on the vessel toppled backward causing him to fall about 20 or 25 feet (8a).

William J. Bennett testified for the defendant. His deposition was also used in the plaintiff's case (31a). He was chief officer on the vessel at the time of the accident and second in command (32a, 67a). He had charge of the deck department and of the repairs which were to be made on the vessel (32a), and was responsible for the upkeep of all the deck department work including "decks, tank work, tank cleaning and so forth" (33a). He was one of the men who drew up the specifications for repairs (64a). As the yard would complete a job he would examine it (33a). He would have occasion also to enter the various tanks of the vessel where the work was going on (34a).

Mr. Bennett testified that among his duties as chief officer it was his duty to inspect tanks for leaks and cracks (67a, 68a) and that this was part of the duties of a chief officer through the years (68a). Furthermore, as chief officer Mr. Bennett has "had occasion to make repairs of leaks" (68a) and has supervised seamen in the making of such repairs (68a).

The plaintiff at the time of his accident was climbing on scaffolding to inspect for and mark leaks in the tank which were to be repaired by Bethlehem men (6a, 23a). Mr. Bennett had testified with reference to the work of the crew in the operation of the vessel (37a):

> "Q. And for what purpose did the ship carry those ladders? A. Well, we used to go up and mark the bulkhead leaks as we found them. We would put the ladder down in the tank *and go up and mark the leaks* or we put a Cordabond repair patch on it." (Italics ours).

When this vessel had come into the shipyard certain leaks had already been discovered on inspection and marked by the officers and crew of the vessel (46a). Mr. Ernst, the ship superintendent of Bethlehem Steel testified for defendant and stated (46a):

> "Q. And it was Mr. Lawlor's job to make the inspection of the bulkhead and the tanks in order to find any leaks which hadn't been pointed out to you by the ship's officers and crew? A. That's right, which he reported back to me."

The jury was justified in finding that the unlashed ladder rendered the vessel unseaworthy (8a, 24a). Joseph Di Liberto a scaffold builder, employed by Bethlehem was called to testify by the defendant. Among other things he stated (56a):

> "Q. You say that it must be fastened to the scaffold? A. It has to be fastened to the scaffold.
>
> Q. Nailed? A. It wouldn't be safe it weren't.
>
> Q. Nailed to the scaffold? A. Nailed or tied or secured in some manner that it would be safe."

The plaintiff was not a scaffold builder (4a). The scaffold was erected by scaffold builders who had their own "snapper" (23a). Later one of the men hollered to him "Hey, Lawlor, your staging's up" (6a). He went below (31a). Before he went below the whole crew of scaffold builders had left (57a, 64a).

At the end of the entire case the court granted a motion to dismiss on the ground of negligence (70a). However the court submitted the case to the jury on the issue of unseaworthiness (82a, 83a). The defendant appealed from a judgment on a jury verdict for the plaintiff and the third-party defendant appealed from the subsequent judgment rendered against it on the third-party complaint.

On appeal the United States Court of Appeals for the Second Circuit, Judge MEDINA, writing the opinion of the unanimous court, affirmed the judgment (Petition p. 28 *et seq.*) 275 F. 2d 599 (2 Cir. 1960). Defendants now seek a Writ of Certiorari from this Court. Plaintiff opposes the petition of the defendant and third-party defendant.

POINT I

The decisions of the United States Court of Appeals and of the trial court were correct and in accord with decisions of this Court and general principles of maritime law.

The unanimous decision of the United States Court of Appeals for the Second Circuit, affirming the rulings of the trial court, is in accord with the decisions of this Court and the general principles of maritime law.

In the unseaworthiness cases which do not involve crew members or longshoremen this court has recognized two distinct lines of cases in determining whether a duty to supply a seaworthy vessel is owed by a shipowner. They are:

(1) Cases, involving vessels being extensively overhauled so as to be virtually rebuilt, such as in the "mothball fleet" cases, which vessels are considered "not in maritime service in any sense" and "there could be no express or implied warranty of seaworthiness to any person." *West* v. *United States*, 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959). See also *Lyon* v. *United States*, 265 F. 2d 219 (2 Cir. 1959); *Raidy* v. *United States*, 252 F. 2d 117 (4 Cir. 1958) cert. den. 356 U. S. 973, 78 S. Ct. 1136, 2 L. Ed. 2d 1147 (1958); *Huber* v. *United States*, 177 F. Supp. 617 (N.D. Cal. 1959); *Latus* v.

United States 170 F. Supp. 837 (D.D.N.Y. 1959); *Amato* v. *United States*, 167 F. Supp. 929 (S.D.N.Y. 1958).

(2) Cases where a vessel retains its overall characteristic as a functional vessel even though it is temporarily tied up for repair work which does not amount to a virtual rebuilding of the vessel. In such case the test is whether the injured worker was doing "work traditionally done by members of the crew." See *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); *The M/V "Tungus"* v. *Skovgaard*, 358 U. S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Casbon* v. *Stockard Steamship Corp.*, 173 F. Supp. 845 (E.D. La. 1959); *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652 (E.D. La. 1957). Cf. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 880, 90 L. Ed. 1099 (1946).

It cannot be claimed that at the time that the plaintiff was working on the defendant's vessel that the vessel was functionally in the class of vessels which are being "virtually rebuilt" because of the extensive nature of the repairs being made. In the *West* case, when it was in the Court of Appeals for the Third Circuit, Judge GOODRICH specifically distinguished the extensive "rehabilitation work" done on the vessel in that case by pointing out at 256 F. 2d 671, 673:

> "* * *. It is not as though the 'Mary Austin' had finished a voyage and was having repair work done before resuming business again. * * *".

The vessel involved in this accident was not "withdrawn" from navigation but was afloat in the navigable waters of the United States at the time of the accident and had a full

crew of officers and men on board (39a, 66a). The officers and crew stood watches, ate on board, made routine inspections and did other work on the vessel while it was tied up at the pier (39a, 66a, 67a). In short, while the repair work was being done, the ship was functioning as it would during any period when it was tied up at a pier.

The position of the plaintiff on the vessel must be compared to the position of William A. Bennett, who was the Chief Officer on this vessel at the time of the accident (64a). Mr. Bennett was the head of the deck department and had charge of the upkeep of decks, tank work, tank cleaning, etc. (33a). It was part of his duty to keep track of repair work as it progressed and to examine the work as the Bethlehem men completed the job (25a). He would enter the tanks where the Bethlehem men were working on occasion while the work was going on (34a). If he had had the same accident which happened to the plaintiff would the defendants deny that he was entitled to a seaworthy vessel? If so, on what grounds?

The vessel was in navigation. It was conceded that there was a full crew of officers and men on board this vessel (39a). It is also conceded that the vessel was afloat in the navigable waters of the United States and tied up to a pier (39a). The fact that the ship was using shore power would not deprive the Chief Officer of his rights as a seaman.

In the case of *Curtis Bay Towing Co.* v. *Dean*, 174 Md. 498, 199 Atl. 521 (1938), cert. den. 305 U. S. 628, 59 S. Ct. 92, 83 L. Ed. 402 (1938), the plaintiff recovered a judgment under the Jones Act. It was affirmed on appeal. He was attached to a steam tugboat which was tied up to the dock of a ship repair company "for the purpose of general inspection and certain repairs." The power for lighting on the ship came from wire connections to the dock. It was held that the plaintiff was entitled to the protection afforded a seaman and member of the crew. The condition

of the vessel in the *Curtis Bay* case does not seem to be too different from the condition of the vessel in the present case. If it were one of the regular crew members on the defendant's vessel who was injured in the present case instead of the plaintiff, Lawlor, the situations would not be distinguishable in any material aspects. Cf. *Oakes* v. *Graham Towing Co.*, 135 F. Supp. 485 (E.D. Pa. 1955). See also *Hunt* v. *United States*, 17 F. Supp. 578 (S.D.N.Y. 1936), aff'd 91 F. 2d 1014 (2 Cir. 1937).

The vessel was taken to the Bethlehem Steel yard on June 20th and departed on July 3rd. It was tied up to a pier from June 24th until it left (38a). With reference to the tanks, repairs were to be made to leaks in the tank bulkheads (32a).

The Chief Offcer of the vessel testified (67a):

"Q. And you were second in command of that vessel, were you not, sir? A. Yes, sir.

Q. And routine inspections were being made of that vessel, were they not, sir? A. Yes, sir.

Q. Just as they would be if the vessel were tied up at any dock or at sea? A. Yes, sir.

Q. So that all in all the shipboard procedure continued? A. Yes, sir.

Q. Now, you, as a chief officer, before this vessel came to Bethlehem Steel, made certain inspections in the tanks, did you not, sir? A. Yes, sir.

Q. *And you inspected the tanks for leaks, cracks, did you not?* A. *Yes, sir.*

Q. *And this was one of your duties as a chief officer?* A. *Yes, sir, that's right.*

Q. This was your work, was it not? A. Yes, sir.

Q. You were competent to do that work? A. Yes, sir.

Q. And you had done that work on other occasions, had you not? A. Yes, sir.

Q. Many other occasions, had you not? A. Yes, sir.

Q. Down through the years that you have been a chief officer? A. Yes, sir.

Q. *As a matter of fact, sir, other seamen also performed that same work of making inspections for leaks, did they not, sir?* A. *Well, other chief officers.*"

* * *

"Q. So that it would be a chief officers job, but not the job of any other seaman, is that what you mean? A. That's right.

Q. *As the chief officer you have also had occasion to make repairs of leaks?* A. *Yes, sir.*

Q. *In tanks, have you not, sir?* A. *Yes, sir.*

Q. And those repairs are made with what is called a—is a quarterbond? A. Cordabond. It depends, the type of leak. Sometimes we use a cement box or Cordabond, which is a type of patch we use, chemical.

Q. And as a seaman, a chief officer, you have done that? A. Supervise the doing of it.

Q. *Supervise the seamen in doing it?* A. *Yes.*

Q. Any particular seaman whose job that would be? A. Well, *I use my boatswain and qualified seaman.*

A qualified seaman is an able bodied seaman, someone who is permitted to go—certified to go aloft on a staging or a rigging.

Q. *And are they qualified to make repairs?* A. *Make repairs, yes, sir.*" (Italics ours.)

Mr. Bernard Ernst, the ship superintendent of Bethlehem Steel tesitfied (46a):

"Q. Mr. Ernst, isn't it true that at the time that you got specifications for the work to be done in tanks of the Mobilfuel there were already pointed out to Bethlehem Steel certain leaks in the tanks?

* * *

A. Right.

Q. And that those known leaks had been discovered by the ship's officers and crew members? A. Yes, sir.

Q. That before the Mobilfuel came to the Bethlehem yard a certain amount of inspection, just as Mr. Lawlor was to make, had been done by the ship's officers and crew members, is that correct? A. That I would say is correct, yes, sir.

* * *

Q. In other words, when a ship came in, the ship's officers would point out to you the leaks which they had discovered? A. Correct.

Q. And it was Mr. Lawlor's job to make the inspection of the bulkhead and the tanks in order to find any leaks which hadn't been pointed out to you by the ship's officers and crew? A. That's right, which he reported back to me."

He also testified (47a):

"Q. And one of his big jobs, one of his main duties was inspection of tanks for leaks? A. Specially on tankers.

Q. Is that a correct statement? A. On a tanker, anyway."

Judge Medina, writing the opinion of the United States Court of Appeals stated (Pet. p. 35):

"We have concluded that the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, and the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decision of this case. Doubtless cases will arise in which the question of fact relative to the degree of control

exercised respectively by the shipowner and the shipyard may be difficult of resolution. But here we have no conversion of a prisoner of war transport into a passenger carrier for the families of overseas service men (*Lyon* v. *United States* 2 Cir., 1959, 265 F. 2d 219), nor extensive repairs amounting virtually to the reconstruction and rebuilding of the vessel (*Berge, supra*), nor a wholly deactivated vessel from the 'moth ball fleet' (*West, supra,*) nothing in the category of major repairs or structural and extensive changes in the vessel, but only a large number of relatively small miscellaneous items such as are generally included in an annual overhaul. While Bethlehem controlled the particular area where the scaffolds and ladders were put up and where the work of locating and repairing the leaks in the tank bulkheads was being performed, the shipowner had general control of the vessel and a full crew of officers and men were aboard. Under these circumstances we hold there was a warranty of seaworthiness by the shipowner running in favor of the crew and also in favor of shore-based workers on the vessel performing work customarily done by seamen.

It is clear that the ladder from which Lawlor fell was not properly secured to the scaffold and the instructions to the jury on the subject of unseaworthiness were perhaps more favorable to the shipowner than it was entitled to. In an event, we find no merit in the claim of error and it is even doubtful if the point now argued by appella ' Socony-Mobil Oil Company, Inc. was properly raised at the trial."

The petitioners now claim that the trial court should have presented to the jury as an "issue of fact" whether the plaintiff was "doing seamen's work." (Pet. p. 8, 12, 26, 27). While the defendants raise this as an issue in their conclusion to the Petition they do not set it forth as a specific question in the "questions presented" in the peti-

tion. They did not present this as a question in the Court of Appeals. In there and in the trial court they treated the question of whether the plaintiff was doing seamen's work as a matter to be decided by the court. They did not ask to have this issue submitted to the jury by any request to charge and did not in their objections ask the court to submit the issue of whether the plaintiff was doing seamen's work to the jury. Instead they maintained at all times that the issue was one to be decided by the court.

In their respective briefs in the Court of Appeals both the defendant and third-party defendant listed only two "questions presented":

> "1. Whether the defendant shipowner warranted to the plaintiff, a shipyard worker supervising permanent repairs on its 'dead' tanker MOBILFUEL, that the vessel was seaworthy.
>
> 2. Whether the tanker MOBILFUEL was unseaworthy with respect to a ladder owned and used only by the repair yard employees, without knowledge or control of the shipowner, because the ladder was not tied so that it could not fall over when the plaintiff undertook to descend it."

The defendants, having assented to submission to the court of the issue of whether the plaintiff was doing seamen's work, can not now raise this question for the first time on this petition. *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358 (1917).

In any case, this Court has in the cases cited herein regarded the question of whether the pa[illegible] injured was doing seamen's work at the time of an accid[illegible] and hence entitled to a seaworthy vessel as an issue to be decided by the Court as a matter of law. We do not know of any case where it was regarded as a jury question. The evidence concerning the work performed by the plaintiff at the time of his in-

jury, the work being done on the vessel, the status of the vessel, and the identical work performed by the Chief Mate on the vessel was not disputed. There was no fact issue raised concerning these matters. Therefore, even if the defendants were permitted to raise this question here for the first time, the issue was one for the trial judge.

The decision in this case in the United States Court of Appeals is consistent with the decisions of this Court dealing with the doctrine of unseaworthiness. It does not conflict with either the *West* case, *supra*, or the *Halecki* case, *supra*, but rather is consistent with both cases.

POINT II

The charge of the trial court on the issue of unseaworthiness was proper.

We have already discussed the facts which support the conclusion that the plaintiff was entitled to a seaworthy vessel. The trial court had stated (83a):

> "If you find from the evidence that the ladder was unsecured and gave way, you may consider that as evidence that it was not adequate or sufficient for the work to be performed by the plaintiff. In other words, defendant owed to the plaintiff the absolute duty of furnishing him with reasonably safe equipment in connection with his work. This does not mean that the shipowner is required to have the best possible equipment. It does not impose an insurer's liability for any and all injuries to those working on shipboard. It means only that the vessel is reasonably fit, that the equipment is such as reasonably would be required on such vessels. The standard is not perfection but reasonable fitness."

Subsequently when the jury asked for a definition of unseaworthiness the court further stated (100a):

"The Court: There isn't anything more I can tell you than I told you before, and that is a vessel, with its appurtenances—that is everything—well, the appurtenances, in this case, would include the ladder—must be reasonably fit for the purpose for which it was intended—reasonably fit. And, of course, they owed a duty of furnishing a seaworthy vessel, safe and proper appliances, in good order and condition. The vessel and its appurtenances must be, in fact, sound and reasonably fit, and its tackle, gear and appliances must be adequate for the purpose for which they will be put.

There is nothing more I can say about it. Reasonably fit for the purpose for which it was intended.

I did charge you that if you find from the evidence that the ladder was unsecure and gave way that it was not adequate and sufficient for the work to be performed by the plaintiff, an unseaworthy condition existed upon the vessel.

I can't tell you anything more than that."

At the request of the attorney for the defendant the court explained its charge to the apparent satisfaction of the attorney for the defendant on this point (102a):

"The Court: It is a question of law there. I will say this, and this is the last thing I will say:

Was the ladder suitable and adequate for the purpose for which it was intended?

Mr. Smyth: That is the question for the jury.

The Court: That is the question for the jury.

Mr. Smyth: Without the conclusion that your Honor put on it.

The Court: That's correct.

Mr. Smyth: So that that statement is withdrawn as far as the jury is concerned?

The Court: Well, in that form, yes, I will leave that out in that form. Of course, they may take into con-

sideration all the facts I have told them, about it being unsecured and so forth, but the real rule is this:

Was it adequate, reasonably adequate for the purpose for which it was intended? That isn't the word, 'adequate.' What was the word I used?

Mr. Smyth: *Suitable.*

Mr. Garber: *Adequate and sufficient.*

The Court: *Yes. That is all I can tell you.*" (Italics ours.)

This charge was fair and reasonable. *Manich* v. *Southern S.S. Co.*, 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944); *Petterson* v. *Alaska S.S. Co.*, 205 F. 2d 478 (9 Cir. 1953) aff'd *per curiam* 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954); *McAllister* v. *Magnolia Petroleum Company*, 357 U. S. 221, 78 S. Ct. 1201, 2 L. Ed. 2d 1272 (1958).

The facts concerning the suitability for the ladder for the use for which it was intended were not in dispute. It is not the fault of the charge of the court that the defendants had no evidence to dispute these facts. In view of the undisputed evidence that the ladder was unsafe and should have been secured the court in submitting the case to the jury on this issue gave the defendants a better charge than that to which they were entitled. Cf. *Sprague* v. *The Texas Company*, 250 F. 2d 123 (2 Cir. 1957). Aside from the defendants' basic contention that the plaintiff was not entitled to a seaworthy vessel from the start, it is not clear what they would have had the court charge on the issue. In any case the court did adopt the explanatory language of the attorney for the defendant in the charge to the jury. The court did not usurp the function of the jury.

CONCLUSION

The unanimous decision of the Court of Appeals affirming the trial court is in accord with the recent decisions of this Court and with the general principles of maritime law.

This Court should not be burdened with a further review of the matter and the plaintiff should not be required to go through the expense and delay of a further appeal in view of this. The undisputed evidence established that the vessel remained at all times within the general control of its owners and that it had a crew working as usual on board. It could not be regarded as a "dead ship." It was and remained a vessel in a functional sense. Under such circumstances the owner of the vessel owed a duty to provide a seaworthy vessel to all those who performed work traditionally done by seamen. The undisputed evidence also established that the work done by the plaintiff at the time of the accident was the same type of work that was performed by the Chief Mate of the vessel in the performance of his traditional duties. Under these circumstances the plaintiff was entitled to a seaworthy vessel.

The charge of the court submitting the issue of seaworthiness to the jury was proper.

The Court of Appeals correctly affirmed the judgment below.

WHEREFORE, the plaintiff-respondent prays that the petition for a writ of *certiorari* of the defendant and third-party defendant be denied.

Rsepectfully submitted,

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